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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

DONALD LEROY JENSEN

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. In light of doctrines concerning Outrageous Governmental Conduct, Due Process Bar and Entrapment, can Government Agents create a felony by supplying one entire element of that felony?

A. Under Article II, do "officers of the United States" have inherent power to engage in felonious conduct for the purpose of creating a crime implicating a private citizen?

B. Under the oath taken to see that the laws be faithfully executed, how can "officers of the United States" have inherent power to engage in felonious conduct to create a crime implicating a private citizen?

C. Under Article I, Section 8 does Congress have the power to authorize an "officer of the United States" to engage in felonious conduct in order to create a crime implicating a private citizen?

D. Under Article I, Section 8 does Congress have the power to authorize an "officer of the United States" to create and participate in a federal felony without that agent also being equally subject to prosecution?

E. This prosecution resulted from an exercise of First Amendment rights.

F. When an "officer of the United States" commits a felony to create a crime and to implicate the accused, why is he not also equally subject to prosecution under the "other remedy" language of Hampton? (425 U.S.490)

G. When an "officer of the United States" commits a felony to create a crime and to implicate the accused, is not the refusal of appropriate authorities to prosecute that officer an exercise of the suspension power, declared by the English in 1689 to be an abhorrent denial of fundamental right?

H. When an "officer of the United States" commits a felony to create a crime and to implicate the accused, is not the refusal of appropriate authorities to prosecute that officer discriminatory as to this Defendant, and a denial of his reasonable expectation of Equal Justice and Protection of the law?

II. The Instructions allowed the Jury to find knowledge from asserted Wilful Blindness (diminishing the required proof of actual knowledge).

A. Must the predicate acts justifying the giving of a Wilful Blindness Instruction be confined only to activities which are inherently nefarious (not merely acts consistent with innocence or ambiguous)?

B. Does a Wlful Blindness Instruction violate Due Process by permitting a conclusion of criminal knowledge and intent rooted upon a failure to view acts as criminal, which acts may be entirely innocent, or ambiguous; and when it fails to confine such conclusion to acts which are unequivocally culpable?

C. Can the courts diminish the Reasonable Doubt standard of Due Process by creating, through a Wilful Blindness Instruction, the undue risk that the defendant will be convicted merely because he acted negligently or recklessly?

D. Can the courts diminish the Reasonable Doubt Standard by permitting a finding of criminal knowledge and intent predicated solely from Wilful Blindness arising from acts which are consistent with innocence, because done in the exercise of other rights or permitted by law?

E. Does the fundamental right to Personal Privacy extend to a Financial Privacy which can only be exercised by use of cash; and more specifically, can the demanded use of cash by one party to a transaction be deemed inherently nefarious and thus evidence against the other party of Wilful Blindness, even though use of cash is lawful and the only means by which to exercise such fundamental right to Financial Privacy?

F. Does the Wilful Blindness Instruction given deny Due Process by including a negative pregnant falsely conveying that the Jury could find not only criminal knowledge, but also criminal intent from Wilful Blindness?

G. Does the Wilful Blindness Instruction, as defined by the Eighth Circuit, deny Due Process, reverse the burden of proof and improperly force the defendant to produce evidence, by placing upon him an improper affirmative duty to rebut by adducing proof that he had not in fact "failed to investigate" and that he had not "deliberately declined to verify or discover the criminal activity"?

H. Was Defendant denied Due Process when the Wilful Blindness Instruction was impermissibly extended to all Counts to the end that the Jury was allowed to cumulate oversights from all Counts to find knowledge and intent in one Count?

III. Under Article III can the courts expand a statute purporting to allow an "officer of the United States" to make a "representation" that funds are the product of illegal activity into allowing that such "representation" need not be expressed but can be implied?

IV. Can "officers of the United States" usurp total control of one party to an ongoing transaction and thereafter orchestrate events to create culpability or an impression of culpability, and act to prevent exculpatory acts and documents?

V. Does the face of 26 U.S.C. 7203 and 6050I supply adequate Due Process notice identifying who has a duty to file and who is subject to prosecution for failure to file?

VI. Because 26 U.S.C. 7203 And 6050i are being applied in a manner showing that there are obvious unarticulated exceptions to enforcement, is there a denial of Due Process and improper Selective Prosecution here?

VII. Was the ongoing concealment by the Government, continued into appeal to Circuit, hiding the existence and identity of witnesses to an extremely critical conversation between the agent and the defendant a reversible denial of exculpatory and impeachment evidence, and prosecutal misconduct?

VIII. Is it a denial of fundamental Due Process and Jury Trial to deny to the jury the exculpatory evidence that Defendant manifested his dis-belief to a co-worker immediately after the Agent left, in a case where belief is pivotal?

IX. Is it a denial of Due Process to deny an Instruction containing Defendant's Theory of Defense concerning structuring rather than failure to file?

X. The Court having entered separate judgment of forfeiture as penalty for conduct concerned in Counts I and II, and the Defendant having satisfied such penalties as ordered, is it a prohibited second punishment under Double Jeopardy to incarcerate pursuant to a second order providing separate and distinct punishment for the same conduct?

LIST OF PARTIES

DONALD LEROY JENSEN is an individual who was a salesman for Wells Ford Mercury, Inc., an automobile and truck dealership. Jensen also owned forty-nine per cent of the stock in that corporation.

UNITED STATES OF AMERICA is the sovereign United States acting through the Internal Revenue Service and the Department of Justice.

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

DONALD LEROY JENSEN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Petitioner petitions this Court to issue Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit to review and reverse decision.

OPINIONS BELOW

This petition seeks review of proceedings in the United States Court of Appeals which reached final decision by sustaining convictions by entry of an order by the United States Court of Appeals for the Eighth Circuit, dated Dec 20, 1995, which denied en banc reconsideration of its decision of Nov 9, 1995, sustaining sentences in District Court entered Nov 17, 1994.

JURISDICTION

Jurisdiction here is pursuant to 28 USC Section 1254.

Jurisdiction in the United States Court of Appeals was under 28 USC Section 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS:

This case concerns convictions under 18 USC 1956(a)(1)(B)(i) (money laundering); 18 USC 1956(a)(3)(B)(C) (money laundering) and 26 USC 7203 and 6050I (reporting cash transaction). For verbiage of some of these, see Appendix.

Powers under Article I, Section 8; Article II, Article III are argued as well as guarantees arising from the First, Fourth, Fifth, Sixth and Ninth Amendments, Article 4, Section 4.

STATEMENT OF THE CASE

NATURE OF THE CASE: This case arises from judgment on verdict on criminal convictions on federal statutes 18 USC 1956(a)(1)(B)(i) and 1956(a)(3)(B)(C) and 26 USC 7203 and 6050I.

COURSE OF PROCEEDINGS: Sentence on verdict was entered. Appeal to the Eighth Circuit. Petition for rehearing denied.

STATEMENT OF FACTS: Donald LeRoy Jensen was a vehicle salesman working for Wells Ford-Mercury, Inc., of which he also owned forty-nine percent. Jensen had no criminal history. Although critical of the IRS, he had always timely paid taxes.

Concerning Count I, Carl L. Thompsen ("Thompsen") was a friend, since about 1988. Thompsen portrayed himself as a successful businessman who owned and operated a million dollar complex consisting of a bar, restaurant and bowling alley in St. Paul called "Haffner's". Except for thesis

he had completed a PhD in psychology. Jensen knew that Thompsen had been investigated for a liquor license and had obtained many recommendation letters for it. He did not know that Thompsen had done time for drug dealing ten years prior. In 1992 Thompsen offered to loan Jensen $75,000 to complete a home. Jensen went to Haffner's to receive such funds in bank bags usually used for deposits.

Unknown to Jensen, Thompsen was arrested in 1993 and became a cooperating individual. Agents found on Thompsen's calendar at Haffner's "40k D Jensen" and "20k D Jensen", referring to the loan. Agents thereafter secretly controlled Thompsen and events surrounding that loan. Jensen offered to have a contract written by an attorney, to make insurance payable to Thompsen, and to arrange a bank loan to repay. Agents interfered. Thompsen told Agents four times that Jensen did not know drug money might be involved. At trial Thompsen changed this story. There was no evidence that the $75000 loaned was drug money or that Jensen had any basis to believe it was. Thompson had ample legitimate funds to make the loan.

The Circuit relied upon Thompsen's claim that he had told Jensen a year before of an investment in marijuana he expected to be profitable. From this the Circuit speculated that Jensen knew that Thompsen was a drug dealer from whom ALL proceeds had to be tainted. This placed a higher duty upon Jensen than that of the liquor license investigators, and reversed the only conclusion permitted to Jensen - that any proceeds concerning Haffner's had been found legitimate when investigated by state authorities for purposes of the liquor licence.

The Jurors posed question to the trial court concerning wilful blindness. The court told them to review the instructions on wilful blindness and wilful - two totally different concepts. In so doing the trial court erased the distinction and expanded wilful blindness to all counts. The

Government then in argument was allowed to wrongfully marshall oversights from all counts and to apply them to one count.

Count II arises from a federal "sting". Jensen was visited by "Bill Fisher" (undercover agent Waters introduced to Jensen by Thompson). Waters had requisitioned federal funds to buy a vehicle. All their conversations were tape-recorded except the one crucial to conviction. On Dec 21, 1993 Waters visited Jensen. The recording ended allegedly because the tape ran out. Waters later testified from memory and his "memorandum". Waters asserted that he held incriminating conversation with Jensen. Waters admits, and the Court found, that Waters never represented expressly that the proceeds were from any specified unlawful activity. The Court instructed that such representation could be implied. Such representation was false because the "proceeds" were requisitioned. Thus, element two of Count II was totally supplied by the Agent. Count II also concerns whether "willful blindness" can be used to show both knowledge and intent as to criminal acts.

Count III concerns an earlier transaction involving Holmes (introduced by Thompson also) who purchased a vehicle from Wells Ford-Mercury, Inc. $21,000 was paid in cash and no Form 8300 (IRS Currency Transaction Report) was filed. Jensen was not assigned by the business nor by law, as the person required to file such Form. There was no evidence that Jensen had any actual notice or knowledge of the filing requirement.

Concerning Count III, the trial court refused to give a structuring instruction consistent with Ratzlaf, treating the count as a failure to file. Conversely, the Circuit reverted to treating the count as structuring, without addressing the complete failure to give an appropriate instruction.

Highly prejudicial matters were first disclosed in the Circuit and long after the trial. On Dec 21, 1993 Waters

visited Jensen to secretly record their conversation. The recording ended when the tape ran out. The Government evaded production pursuant to Court order citing "technical failure", thereby implying no tape existed. Waters then gave a highly damning portrayal of a conversation with Jensen, based on memory and "memorandum".

Long after the trial and in Circuit, a redacted copy of the tape was supplied. For the first time Jensen learned that the Government did have witnesses who had, in fact, heard by radio that vital conversation. He learned the Government had withheld from him for defense vital evidence of exculpatory nature, Brady v. Maryland, 373 U.S. 83, 104 (1963), and with impeachment value. U.S. v. Bagley, 473 U.S. 667 (1985).

REASONS RELIED UPON FOR ALLOWANCE OF WRIT: Issues involved are of exceptional character and of great public importance meriting review by this Court.

STANDARD OF REVIEW. This Petition is based upon plain errors concerning federal law made by the Courts below and is de novo. U.S. v. Olana, 113 S.Ct. 1770, 1776-79 (1993).

ISSUES PRESENTED

I. In light of doctrines concerning Outrageous Governmental Conduct, Due Process Bar and Entrapment, can Government Agents create a felony by supplying one entire element of that felony?

The cases uniformly hold that "entrapment" assumes that the accused committed all the elements. U.S. v. Russell, 411 U.S. 423 (1973); U.S. v. Mahoney, 355 F. Supp. 418, 425 (ED La 1973); Greene v. U.S., 454 F.2d 783, 786 (C.A. 9 1971). The Agent is limited to supplying opportunity. Agent

creation of the crime far exceeds entrapment.

> ". . . in drug related offenses law enforcement personnel have turned to one of the only practicable means of detection: the infiltration of drug rings and limited participation in their unlawful present practices. Such infiltration is a recognized and permissible means of investigation; . . . . " (emphasis supplied). U.S. v. Russell, 411 U.S. 423 (1973)

Here we find not mere "infiltration" for "limited participation" as a means of "investigation" but rather total participation in creation of an offense.

The power of the Court in applying entrapment centers upon intent, ie., Congress could not have intended punishment. In U.S. v. Russell, 411 U.S. 423 (1973) this Court was asked to rest the defense of entrapment (all elements by the accused) upon constitutional grounds. This Court refused reserving the issue:

> "Since the defense is not of a constitutional dimension, Congress may address itself to the question and adopt any substantive definition of the defense it may find desirable." (emphasis supplied).

Here, complete elements were supplied by the Agent so that substantive definition relates to creation of the offense, NOT mere definition of a defense.

The power of the Court to apply the Due Process bar has been held to stem from: (1) fundamental fairness, (2) supervisory powers of the Court, and (3) from equitable precepts. Jensen submits that such power also stems from: (4) Art IV, Sec 4, which impliedly guarantees a Republican Form of federal government, and (5) a reserved right under Amendments Nine and Ten.

If the accused independently and solely commits all

elements of A, B, and C, the issue may concern entrapment. Where there is no offense without the Agent supplying one or more element(s), the matter is no longer entrapment, but is joint or independent criminal activity. Because the Agent can, under Article II, act officially only to see that the laws are faithfully executed, illegal acts by him place him outside his office. Where elements of A, B and C are necessary to define the offense, and the Agent solely commits or provides element B, no offense exists without Agent acts, and the matter is not entrapment but rather joint criminal activity. 22 C.J.S., Criminal Law, Section 63, "Commission of Essentials of Offense by Accused". Where the Agent commits a separate felony to supply element B, the matter is not one of entrapment, but rather independent criminal activity. When the Agent acts, contrary to his sworn duty to uphold the Constitution, to supply element B, he is no longer an Agent. Article II, Section 4; Pointdexter vs. Greenhow, 114 U.S. 270 (1885); U.S. v. Lee, 27 L.Ed. 171, 181. Legislation which purports to allow him to act unlawfully is invalid. Butz v. Economou, 438 US 478, 490 (1978); Ex Parte Young, 209 U.S. 123, 159-60 (1907).

The defense of Due Process bar, although quite similar to the objective application in entrapment, is different. Due Process Bar is predicated from the tenet that some Agent conduct is so outrageous that fundamental fairness bars prosecution. Whether the accused admits the crime, or was predisposed to do it is irrelevant. It is an issue of law.

In Hampton v. U.S., 425 U.S. 484 (1976) this Court suggested:

> "If the police engage in illegal activity in conspiracy with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law."

The statement refers to "illegal" acts in "conspiracy". The term "equally culpable defendant" is ambiguous because it does not state which of the following is contemplated:

a. The Agent and the defendant have separately, but in conspiracy, each done all the elements under a criminal statute (eg., each does elements A, B, and C), OR

b. Each did only part of a completed violation of the statute (one or more of the elements), but when combined or aggregated together in conspiracy, all elements have occurred (eg., Agent does element A and accused does B and C).

The language, "equally culpable" implies that the first situation above was intended. That situation does not exist here because, without the false "representation" by the Agent, there is no offense at all. The Agent did not just implant the idea or induce commission. The Agent supplied one whole element. He was a co-party to a crime which would not exist without his input.

A. Under Article II, do "officers of the United States" have inherent power to engage in felonious conduct for the purpose of creating a crime implicating a private citizen?

If the representation were true, the combined joint acts of the Agent and the accused to complete an offense form a conspiracy to violate federal laws (18 U.S.C. Sec 371). If false, the Agent is guilty of making a false representation. (18 U.S.C. Sec 1001). The Agent was a principal under 18 U.S.C. Sec 2, in the exact same manner as the Court instructed concerning Jensen.

Article II provides an Agent is subject to removal for commission of high crimes and misdemeanors. Art II, Sec 4;

Synar v. U.S., 626 F.Supp. 1374, 1395 (1986). An Agent obviously has no inherent power to do that which would make him subject to removal from office.

B. Under the oath taken to see that the laws be faithfully executed, how can "officers of the United States" have inherent power to engage in felonious conduct to create a crime implicating a private citizen?

Official illegality IS NOT POSSIBLE, because Article II requires "officers of the United States" to swear to see that laws of the United States be faithfully executed. They are subject to removal for criminal acts. Art II, Sec 4.

Here, we do not have separate activity of an accused set in motion by illegal acts which induced him to act. As a matter of law the Agent had to be a co-actor for there to be a crime at all.

C. Under Article I, Section 8 does Congress have the power to authorize an "officer of the United States" to engage in felonious conduct in order to create a crime implicating a private citizen?

> "... to declare that the Government may commit crimes in order to secure the conviction of a private criminal - would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face. Olmstead v. U.S., 277 U.S. 438, 485 (1928) Brandeis, J. (dissenting).

Congress cannot authorize acts which are prohibited by the Constitution. The Constitution provides for Agent removal from office for commission of high crimes and misdemeanors. Congress cannot authorize an Agent to engage in such criminal acts to create a crime.

An Agent who violates his duty and oath under the Constitution gains no protection in relying upon an invalid statute. Butz v. Economou, 438 US 478, 490 (1978) (federal); Ex Parte Young, 209 U.S. 123, 159-60 (1907) (state).

Nothing in Article I, Section 8 gives the power to participate in crimes, nor to exercise police powers. The United States argued below that Congress did have authority under the Enumerated Powers to enact Sec 1956: (1) power to collect taxes, and, (2) power to provide for the general welfare. The "general welfare" relied upon in the tax power is not a separate power - it only identifies the purpose for which taxes may be exacted.

It is uncontroverted that the Act under which Jensen was convicted was to, "control the laundering of monetary instruments and specified unlawful activity (e.g. drug trafficking)". That is not an exercise of the taxing power. It is an unauthorized exercise of the police power. Furthermore, the IRS, an agency created under the taxing power and claiming authority to garner vast amounts of information of highly private nature, cannot be empowered to exercise what are solely police powers. There also is no necessary and proper implied power to do so. McCulloch v. Maryland, 17 U.S. 315, 415 (1819).

The United States claims as a third enumerated power the power to regulate interstate and foreign commerce. The Act does not purport to be an exercise of that power. It is not confined to such areas. It does not have the required proof of nexus to interstate commerce.

The United States denies that its Agents committed federal felonies and states that no such laws exist. Federal criminal statutes do not make exceptions for Agents. U.S. v. Eisenmann, 396 F.2d 565 (CA 2 1968). They cannot. Given the facial verbiage and plain meaning of those statutes, Agents are obligated to prosecute violations and it is misprision to refuse. If an Agent were charged, a Court

would be required to submit such charge to a jury. It is probable that a jury would convict upon such charge.

D. Under Article I, Section 8 does Congress have the power to authorize an "officer of the United States" to create and participate in a federal felony without that agent also being equally subject to prosecution?

Because the protection of Due Process Bar arises from the Constitution, Congress cannot legislate it away. Jensen's right to be free from the discriminatory suspension of the criminal law to friends of the Crown (Executive Branch) is fundamental. It is a right protected by the Due Process Clause. It is reserved by the Ninth and Tenth Amendments.

This Court has held in Hampton, id. that the "equally culpable" officer should be prosecuted.

E. This prosecution resulted from an exercise of First Amendment rights.

Jensen had been highly vocal against the IRS. Agents were aware of his animosity, and used it to bait him. This was apparent at trial. There is ample indication that he was selected for having spoken so freely, and to curtail future criticism.

Jensen was also exercising freedom of speech and privacy in his statements regarding any need to file returns.

There are within the penumbra of Amendments One, Four, Five, and Nine zones of privacy. Eg., Griswold v. Conn. 381 U.S. 479 (1965). The right to privacy has also been legislated. Eg., 5 U.S.C. Sections 552 and 552a; 12 U.S.C. Sections 3401-22; 26 U.S.C. Section 6103. That right includes the option to conduct business secretly in private, to economically associate together, and to carry on discourse with persons of choice. It carries with it the means of

exercise. Bank records are not private, for checks and deposit slips are required to be copied and retained. The only means by which one can carry on financial transactions in private is by using cash. Reporting of some cash transactions was legislated. Jensen was asked by a customer concerning payment. He offered forms of financing. The customer did not wish to have the matter reported. Not all transactions are required to be reported. Jensen was not required to formulate payments to require reporting. He was allowed to advise the customer of means by which he believed the reporting duty would not apply. He may have been in error, but it was within the scope of financial privacy and free speech that he give opinion. There is no presumption of guilt arising from protected activity, eg. from not wanting to discuss it on the phone or from using cash. The suggestion that inferences of knowledge, intent or guilt arise from the exercise of protected rights is error.

F. When an "officer of the United States" commits a felony to create a crime and to implicate the accused, why is he not also equally subject to prosecution under the "other remedy" language of Hampton? (425 U.S.490)

In supplying a total element the Agent was a principal under 18 U.S.C. Sec 2, in the exact same manner as the Court instructed concerning Jensen. Although this Court in Hampton clearly proffered a remedy for illegal acts of the Agent, that remedy is unrealistic, hollow and specious because other Agents will not charge their own, and the Courts will not enforce that remedy. The individual wronged is left powerless to see the remedy enforced. For remedy to exist, the Courts must provide it. It would totally blow the minds of the Founders to realize that Agents would claim the privileged power to participate in "high crimes and misdemeanors" to co-implicate private citizens, and that

courts of law would countenance it!

G. When an "officer of the United States" commits a felony to create a crime and to implicate the accused, is not the refusal of appropriate authorities to prosecute that officer an exercise of the suspension power, declared by the English in 1689 to be an abhorrent denial of fundamental right?

Early in the law, the King and his justices claimed the "suspension and dispensing power". In 1689 such claimed powers were abolished by Parliament, stating, "...the pretended power of suspending of laws, or the execution of laws, without consent of Parliament, is illegal." (I William and Mary sess. 2c. Sec. i I) quoted in 6 Holdsworth, The Principles of Public Law, p. 240. This was fundamental law at the time our Constitution was framed. Because the English Constitution IS the "conscience of Parliament" Parliament may have the power to allow suspension. Our written Constitution expressly charges all Agents with the faithful execution of all laws without exceptions. All officials are creatures of the law and bound to it. Pointdexter vs. Greenhow, ll4 U.S. 270, 288 (l885). No one is above it. U.S. v. Lee, 27 L.Ed. 171, 181. There is no immunity for violation. Forrester v. White, 108 S.Ct. 538, 543 (l988). Congress cannot authorize violations. Butz v. Economou, 438 US 478, 490 (l978). All civil "officers" are removable for criminal acts. Art II, Sec 4; Synar v. U.S., 626 F.Supp. 1374, 1395 (1986).

H. When an "officer of the United States" commits a felony to create a crime and to implicate the accused, is not the refusal of appropriate authorities to prosecute that officer discriminatory as to this Defendant, and a denial of his reasonable expectation of Equal Justice and Protection of the

law?

The right to equal treatment and protection of laws is implied in the Due Process Clause of the Fifth Amendment. Bolling v. Sharpe, 347 U.S. 497 (1954).

The "equally culpable" officer is to be charged. Hampton, id.

II. The Instructions allowed the Jury to find knowledge from asserted Wilful Blindness (diminishing the required proof of actual knowledge).

The Jury was sworn to take its law from the Court and was presumed to abide the instructions. U.S. v. Kaufmann, 985 F.2d 884, 896 (CA 7 1993). Constitutional rights are substantial. (Olana, id.). Error on "willful blindness" is substantial. U.S. v. Barnhart, 979 F.2d 647, 652 (CA 8 1992).

Proof of knowledge is fundamental. Staples v. U.S., 114 S.Ct. 1793 (1994). Relating to the criminal acts themselves, actual "knowledge" plus specific "intent" to violate a known rule combine to define "willful". Ratzlaf v U.S., 126 LEd2d 615 (1994). There must be a known purpose to violate the law. (It is not a crime to select, or advise, choice of the free bridge over the toll bridge!).

Evidence relating to Jensen's "knowledge" has two totally different aspects: 1) in regard to criminal acts themselves, whether he had actual "knowledge" concerning whether such acts were criminal, and 2) whether he had "knowledge" of criminal activity from which one could, by use of "willful blindness", predicate an affirmative duty to inquire, and from this find a blindness from which to predicate "knowledge" of the criminal acts themselves. (In Ratzlaf this Court addresses whether certain activity is inherently "nefarious", concerning the criminal acts themselves - not in making determination as to willful blindness).

The knowledge concerning criminal acts under Sec 1956 is expressly twofold: 1) the Defendant must know "that the property involved ... represents the proceeds of some form of unlawful activity", which is specified, and 2) he must know "that the transaction is designed ... to conceal or disguise the nature, the location, the source, the ownership, or control of the proceeds". He need not be the designer, but the design must be proven. In U. S. v. Falcone, 109 F.2d 579 (CA 2)(1940), the court distinguished knowledge of illegal use from intent to promote illegal use:

> "...he must in some sense promote their venture himself, make it his own, have a stake in its outcome"

Proof of such knowledge, or of "stake" was totally absent here. Also, use of "willful blindness" to make such proof removes the constitutionally-required notice of illegality, and renders the statute impermissibly vague. It does not merely ease the burden of proof concerning intent - it reverses it!

Knowledge combines with intent to define "willful", but the two remain separate, and proof of intent does not flow from proof of knowledge. District Sales v. U.S., 319 U.S. 703, 712 (1943).

"Willful blindness" ONLY suggests knowledge. It is not its purpose, and it exceeds constitutional limits to use it to suggest intent. It cannot be used to show "willful" (intent with knowledge).

Sec 1956(a)(1)(B)(i) fails in three ways to define. First, the initial knowledge requirement contained in subsection (a)(1) - that the defendant "know" that the property was derived from "some" unlawful activity - is impermissible, especially when used with a willful blindness standard of knowledge. Second, the second "knowledge" requirement, in (a)(1)(B)(i), violates Due Process if interpreted to require knowledge of someone else's intent - the designer. It criminalizes a legitimate financial transaction if a second

party intends disguise even if the defendant does not. Third, Congress didn't define the operative term "proceeds" which it uses with conflicting meanings.

If a defendant is charged under Sec 1956(a)(1)(a) rather than (a)(1)(B), then he need not know what specific crime generated the proceeds but yet he must know the specific crime being concealed! Applying willful blindness to a statute that does not specify what a defendant must know renders the statute vague, especially if applied to legitimate commercial activities.

Subsection (a)(1)(B)(i), prohibits all transactions with vague forms of knowledge. It is not confined to "red flag" situations.

The term "proceed" is not defined in Section 1956 and has varying meanings in the code. It has no "ordinary" meaning. Everything received in place of the original money is considered a "proceed" but not the original money "exchanged" for the narcotics. See, Drug Agents' Guide, at p. 142; U.S. v. Blackman, 904 F.2d 1250, 1257 (Ca 8 1990).

The meaning of "willfully" depends on application. Spies v. U.S., 317 U.S. 492 (1943). It means "intentionally, deliberately and knowingly" concerning crimes malum in se; but "the voluntary and intentional violation of a known legal duty" concerning crimes malum prohibitum. State v. Azneer, 526 N.W.2d, 298 (Iowa 1995). There must be proof of a "voluntary, intentional violation of a known legal duty". Cheek v U.S., 498 U.S. 192, 201 (1991). The jury must be properly instructed as to defendant's ignorance of the law. Ratzlaf, citing U.S. v. Granda, 565 F.2d 922 (CA 5 1978).

Willful blindness violates the separation of powers doctrine by the Courts undertaking to legislate a new mens rea requirement onto a criminal statute. U.S. v. Morisette, 324 U.S. 246, 263 (1962); Frans J. von Kaenel, Willful Blindness: A Permissible Substitute for Actual Knowledge Under the Money Laundering Act?, 7 Wash Univ L Quart

1189, 1204-5, f.n. 103 (1993).

The Courts have acted legislatively in expanding what Congress has already defined - a citizen's duties following knowledge of law violations of others is already misprision of felony. Rendering innocent or ambiguous conduct inherently culpable, or the basis for guilt is also prohibited legislation. McBoyle v. U.S., 283 U.S. 25 (1931).

A. Must the predicate acts justifying the giving of a Wilful Blindness Instruction be confined only to activities which are inherently nefarious (not merely acts consistent with innocence or ambiguous)?

A large amount of information is required before any duty to inquire imposed by the rule concerning probable criminal activity arises. Frans J. von Kaenel, 7 Wash Univ L Quart 1189, id. For it to appear that criminal activity is probably afoot, giving rise to any duty to inquire, there must be manifestations which imply, and provide notice of, criminal activity. Such activity must be unequivocally criminal. U.S. v. McAllister, 747 F.2d 1273, 1275 (CA 9 1983); U.S. v. White, 794 F.2d 367, 371 (CA 8 1986) Ratzlaf, id. If such activity could be perceived as lawful, the law can impose no affirmative duty to inquire because this reverses the presumption of innocence. If such activity can be perceived as ambiguous, i.e., either culpable or innocent, the presumption of innocence requires that it be perceived as innocent. Crandon v. U.S., 495 U.S. 411, 422 (1990). There is nothing in the record to show that Jensen had reason to believe that unequivocally criminal activity was afoot. Therefore, the law could not impose upon him an affirmative duty to inquire, the failure of which results in knowledge and intent. Any conduct seen by Jensen was not only not nefarious, but consistent with innocence and the exercise of rights.

B. Does a Wilful Blindness Instruction violate Due Process by permitting a conclusion of criminal knowledge and intent rooted upon a failure to view acts as criminal, which acts may be entirely innocent, or ambiguous; and when it fails to confine such conclusion to acts which are unequivocally culpable?

"Willful blindness", logically leads to an irrelevant conclusion, i.e., it is only evidence of recklessness, not of knowledge. Ira P. Robbins, The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea, 81 J. Crim. L. & Criminology 191 (1990). It permits a finding of guilt from innocent or ambiguous conduct. It is based only upon suspicion, and such finding should not be permitted because suspicion implies a lack of, rather than the presence of knowledge. Comment, Willful Blindness as a Substitute for Criminal Knowledge, 63 Iowa L.R. 466, 473 (1977).

C. Can the courts diminish the Reasonable Doubt standard of Due Process by creating, through a Wilful Blindness Instruction, the undue risk that the defendant will be convicted merely because he acted negligently or recklessly?

Willful blindness violates Due Process by allowing an element of a crime to be proven to a standard much less than beyond a reasonable doubt. In Re Winship, 397 U.S. 358, 364 (1970); 7 Wash Univ L Quart 1189, 1204-5, f.n. 103. It allows conviction from innocent conduct. Sullivan v. Louisiana, 124 L.Ed.2d 182 (1993). It violates Due Process and fundamental reserved Ninth Amendment rights by purporting to impose upon the defendant, under circumstances which are not pre-defined and without identified notice, an affirmative duty to be unduly suspicious and to inquire concerning the lawfulness of other citizens - rather than allowing him to engage the common law and

Judeo-Christian presumption that others usually conduct themselves lawfully, honestly, in good faith and fairly.

D. Can the courts diminish the Reasonable Doubt Standard by permitting a finding of criminal knowledge and intent predicated solely from Wilful Blindness arising from acts which are consistent with innocence, because done in the exercise of other rights or permitted by law?

Jensen did what he believed would not be an offense. He suggested to the office manager that funds less than $10,000 be deposited on different days. The Trial Court viewed this case as a failure to file, and not as structuring as in Ratzlaf v. U.S., 126 L Ed2d 615, (1994). Whether Count III is seen as structuring or a failure to file, willfulness must be proven. "Willfulness" requires both knowledge of the duty and specific intent to commit the crime. Ratzlaf, id. Structuring is not itself nefarious. (Ratzlaf, id.). Therefore, conduct proving structuring does not ipso facto show purpose to do wrong necessary to prove "willfulness". (Ratzlaf, id.). Actual knowledge that acts are unlawful must be proven. The Jury had to find that Jensen knew his acts were unlawful. (Ratzlaf, id.). It could not do so.

E. Does the fundamental right to Personal Privacy extend to a Financial Privacy which can only be exercised by use of cash; and more specifically, can the demanded use of cash by one party to a transaction be deemed inherently nefarious and thus evidence against the other party of Wilful Blindness, even though use of cash is lawful and the only means by which to exercise such fundamental right to Financial Privacy?

There is nothing inherently nefarious about the use of cash. Cash is the legal tender. Cash is the only means by

which one can exercise financial privacy. The United States urges that no record was made. A record was made - that is what brought the matter to the Agents' attention - Thompson had written the amounts on his desk calendar. Jensen attempted to have the matter reduced to writing. At this point however, unknown to him, he was no longer dealing with Thompson, but rather Agents, and who actively improperly intervened to prevent any writing of the transaction for their own purposes. Jensen's reluctance to discuss matters on the telephone is perfectly consistent with legitimate purposes.

Pervasive in the record and at trial was an apparent underlying assumption, never directly spoken but very evident, that attempts at privacy or secrecy in one's dealings and affairs are somehow evidence of unlawful conduct. Efforts to refrain from disclosing, or to prevent dissemination of one's private matters do not imply nefarious conduct. Petitioner and many other citizens have strong feelings concerning what they perceive are their private matters. They strongly resent those who would intrude or seek to know what they feel is absolutely none of their business. They believe that such privacy is a guaranteed right consistent with the basic attitude of the Founders. Implications at trial that such seeking of privacy implies unlawful activity improperly turns the guarantee on end and destroys it.

Under the instructions as originally given the only evidence to justify an inference that the proceeds were from drug transactions was the claimed general statement by Thompson made a year earlier that he had at one time profited from an investment in marijuana. He did not tell Jensen that this was drug proceeds. He did not tell Jensen that he was a dealer. In fact he specifically told people <u>not to tell Jensen</u>. Where multiple Counts are charged, evidence bearing on each must arise from that Count, and cross-marshalling from other Counts is unduly prejudicial. Under

the instructions as originally given, the Jury was not allowed to rely upon oversights relating to other Counts. Without that, there was not sufficient evidence to submit the Count. In responding to the question of the Jury concerning the meaning of wilful blindness, and improperly merging the two instructions concerning wilful blindness and wilful, the Court impliedly allowed the Jury to do the improper cross-marshalling from other Counts.

There is no evidence at all indicating that Jensen knew the money borrowed was from drug transactions. There is no evidence at all that he had any knowledge that the transaction was to disguise the nature of the proceeds. Conversely, the evidence is that Jensen sought to make a public record of the loan but was obstructed from doing so by the Agents. If any concealment occurred, it was done by the Agents - for their own purposes.

F. Does the Wilful Blindness Instruction given deny Due Process by including a negative pregnant falsely conveying that the Jury could find not only criminal knowledge, but also criminal intent from Wilful Blindness?

Willful blindness must relate only to inferences of knowledge - not to willfulness concerning criminal acts. Instruction 30 concluded by stating that:

> ". . . and the inferences to be drawn from any such evidence. A showing of negligence or mistake is not sufficient to support a finding of willfulness or knowledge." (emphasis added).

That statement creates the negative pregnant that willfulness (not just knowledge), concerning criminal acts, may be inferred from willful blindness. Because "willful" includes intent, that instruction allows an improper and highly prejudicial inference of intent from willful blindness.

G. Does the Wilful Blindness Instruction, as defined by the Eighth Circuit, deny Due Process, reverse the burden of proof and improperly force the defendant to produce evidence, by placing upon him an improper affirmative duty to rebut by adducing proof that he had not in fact "failed to investigate" and that he had not "deliberately declined to verify or discover the criminal activity"?

The Eight Circuit announced in Farley v. Benefit Trust Life Ins Co., 979 F.2d 646, 652 (CA 8 1992), a standard which shifts the burden of proof:

> " the defendant must have failed to investigate those facts, thereby deliberately declining to verify or discover the criminal activity."

That affirmative burden cannot be put upon the defendant, and especially when permitted from innocent or equivocal acts. U.S. v. Murrieta-Bejarano, 552 F.2d 1323, 1325 (CA 9 1977); U.S. v. Avarado, 817 F.2d 580, 584 (CA 9 1987). That standard relies upon presumptions contrary to basic common law and Judeo-Christian tenets. It allows knowledge to be indirectly based upon conduct which is innocent. Concerning Count III, a failure to file or structuring, requires that "willfulness" be proven. "Willfulness" requires both actual knowledge of the reporting requirement and specific intent to commit the crime. Structuring is not inevitably nefarious. Therefore, conduct involving structuring does not ipso facto show a purpose to do wrong sufficient to prove "willfulness". Actual knowledge that acts are unlawful must be proven.

H. Was Defendant denied Due Process when the Wilful Blindness Instruction was impermissibly extended to all Counts to the end that the Jury was allowed to cumulate oversights from all Counts to

find knowledge and intent in one Count?

As originally given the willful blindness instruction (No 30) opened "The element of knowledge required by Count I ..." (emphasis added). The Jury posed its question. The Court then directed attention to instructions 30 and 38. Instruction 30 related to "willful blindness" and was confined to Count I. No. 38 related to "willful". "Willful" related to all Counts.

The terms are totally different. "Willful blindness", as a judicially-created technique allowing inference of knowledge, in no way relates to intent, state of mind, or deliberateness as they relate to criminal acts themselves. By merging the concepts the Jury was told to use a lessened standard of proof. The Jury was told to infer knowledge and intent in all Counts from a lack of seeing rather than from the required positive showing.

Evidence must be adduced specific to each count. U.S. v. Rabbit, 583 F2d 1015, 1022 (CA 8 1978); Rule 404(b).

Logically, the oversights from which knowledge may be inferred can arise in a context of quality and quantity. One oversight can be so egregious as to make it probable that one deliberately refused to see. Less glaring oversights might be so repeated as to make it probable that there was refusal to see.

Application of the willful blindness instruction to multiple counts gives undue advantage to the Government when pursuing multiple charges in one trial. The Government told the Jury to marshall oversights from other Counts: ["So that evidence -- when you are thinking about Count III – all relates to the other counts"] and even from the matters not charged. It ended that argument referring to several counts:

> "...what this all shows (indicating) is that the defendant, at the very least, was willfully blind to what was going on." (emphasis added).

Such application from the several counts to the one was improper and very prejudicial.

III. Under Article III can the courts expand a statute purporting to allow an "officer of the United States" to make a "representation" that funds are the product of illegal activity into allowing that such "representation" need not be expressed but can be implied?

The statute, facially and as applied, is unconstitutional. To convict, the Agent must represent that the proceeds were drug funds and the product of illegal activity. Such representation was at most implied, and was totally false. The Agent testified that he requisitioned government funds to make the purchase. He had to commit a felony in making the false representation that the proceeds were the product of illegal activity. The face of the Act requires that the "representation" must be explicit. Even if the "representation" is not required to be explicit, the events, conduct or appearances to arrive at an implied "representation" must be unequivocally culpatory to allow the inference and to satisfy the reasonable doubt standard. To permit an inference supporting culpability be drawn from innocent or ambiguous acts is shocking.

In this case it is undisputed that a "representation" was never expressed. Evidence relating solely to this Count did not show that proceeds involved flowed from specified unlawful activity. The Court should have directed verdict.

The Agent admitted he made no expressed representation. The Court agreed. The Jury had to have inferred that the Agent did impliedly make the representation - one which he knew was false. The Jury must have also been directed, as a matter of law, that the Agent had taken oath to uphold the law, knew it, and impliedly did follow it - that no explicit representation was made - and that the Agent could not under law make such

representation! The trial court allowed the Jury to presume that the Agent could under law commit a felony and do unconstitutional acts.

Count II charges Jensen with conducting a financial transaction with funds "represented" to be the proceeds from narcotics, with intent to conceal and disguise the source, and to avoid reporting. The statute defines "represented" as any representation. The statute lacks indication of what conduct, by an officer, would constitute a "representation". The Courts may not amend the statute to define Congressional intent by defining "conduct".

IV. Can "officers of the United States" usurp total control of one party to an ongoing transaction and thereafter orchestrate events to create culpability or an impression of culpability, and act to prevent exculpatory acts and documents?

Concerning Count I, Agents usurped total control of events as they unfolded. Jensen attempted to have instruments drafted and to repay the loan. Agents actively interfered. By seizing control and orchestrating events to serve their purposes Agents prevented Jensen from completing the deal and from drafting those documents which would have supported his position of innocence. Agents even orchestrated the timing of the repayment of the loan to occur after the secret indictment of Jensen to enable them to seek forfeiture.

In Brady v Maryland, 373 U.S. 83, 104 (1963) the Court held that the suppression of requested material evidence violated Due Process. Brady concerns the disclosure of evidence already existing. Brady does not address whether Agents may control events to prevent exculpatory evidence, or create the impression of guilt.

Concerning Count I, by phone with Thompsen, Jensen asked about repayment. The Agent interfered. The

Report for January 25, 1994 admits that, "The purpose of this conversation was to delay the return of the $75,000 to the CI by JENSEN". The Agents had several interests to be advanced. Repayment would be evidence of bona fides. Repayment would obviate forfeiture. Issuing a draft (of quasi public nature) would negate the claim of covert acts.

Jensen suggested he have a lawyer draw their agreement. The Agent interfered. Going to lawyers, and having the agreement written would be consistent with bona fide business practices, and would also result in a document showing lack of intent to conceal which could be produced to a Jury!

Jensen believed he was dealing with Thompsen. He did not know that the Agent had usurped Thompsen's position. He did not know he was dealing with an undisclosed principal with total control - of both sides. He could not realize that such principal was blocking his efforts and obstructing the natural course of events - a course consistent with his innocence - and was also actively manipulating events for the purpose of coloring him as culpable. This is outrageous!

Such over-zealous involvement in controlling events exceeds mere investigation, and crosses into created crime. The Agent was not a disinterested investigator, but an eager participant, a co-actor shaping events to his theories and creating a crime or impressions of a crime. The Agent became so involved that the policy underlying the objective standard of entrapment and Due Process Bar was crossed. Agent involvement in Count I affronts a sense of justice and fair play. It shocks the conscience. Hoffa v. U.S., 385 U.S. 293 (1966) (Warren dissent).

V. Does the face of 26 U.S.C. 7203 and 6050I supply adequate Due Process notice identifying who has a duty to file and who is subject to prosecution for failure to file?

26 U.S.C. 6050I, 7805 and 7807 provide that the Secretary shall prescribe needed rules and regulations. He has not done so. Regulations 26 CFR 1.6050I-1 show that the "any person" required to report is not defined.

Section 6050I provides that "any person" who is engaged in a trade or business who receives more than $10,000 while so engaged shall file the return. "Any" person effectively means "every" person must so file. That is not what is being enforced.

VI. Because 26 U.S.C. 7203 And 6050i are being applied in a manner showing that there are obvious unarticulated exceptions to enforcement, is there a denial of Due Process and improper Selective Prosecution here?

IRS does not require all who fall within the scope of the statute to file. When multiple persons engaged in the same business receive over $10,000 while all are engaged in the same trade or business, as being applied all are not being expected to report. Application is obviously being done selectively based upon motives or basis not identified by statute or regulation.

A failure to file case requires an analysis of who has the duty and who is subject to prosecution. On its face, 26 U.S.C. 6050I reposes the duty with "any person" engaged in a trade or business who receives more than $10,000 in cash. "Any" means "all".

As Sec 6050I is being applied it is apparent that there are implied exceptions to the duty. The duty to file is identified by the statute as residing in "any" person receiving $10,000 in cash. All persons equally situated are not being charged. U.S. v. Varbel, 780 F.2d 758, (CA 9 1986); U.S. v. Larson, 796 F.2d 244 (CA 8 1986).

The failure to identify the party with responsibility for filing allows Agents and prosecutors, upon their will alone, to improperly capriciously select for prosecution. Yick

Wo v. Hopkins, 118 U.S. 356 (1885). Vagueness invites interpretation which constitutes prohibited field or courtroom legislation. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

VII. Was the ongoing concealment by the Government, continued into appeal to Circuit, hiding the existence and identity of witnesses to an extremely critical conversation between the agent and the defendant a reversible denial of exculpatory and impeachment evidence, and prosecutal misconduct?

While this case was in Circuit the Government for the first time turned over tapes. For the first time Jensen learned that the conversation of Dec 21, 1993 had been heard by radio by three or more Agents. They were witnesses of a highly germane conversation. The tape had not been produced pre-trial as ordered. Had it been, Jensen would have known of such additional witnesses and could have examined them for exculpatory evidence and impeachment. Failure to have such knowledge pre-trial is highly prejudicial to Jensen and error. Brady v. Maryland, 373 U.S. 83, 104 (1963); U.S. v. Bagley, 473 U.S. 667 (1985).

VIII. Is it a denial of fundamental Due Process and Jury Trial to deny to the jury the exculpatory evidence that Defendant manifested his dis-belief to a co-worker immediately after the Agent left, in a case where belief is pivotal?

The decision to exclude evidence of dis-belief was a prohibited directed verdict of guilty, and denial of trial by jury. Sullivan v. Louisiana, 124 L.Ed.2d 182, 187 (1993).

When Waters left, Jensen went to Mikolay and caused him to deduce that Jensen did not believe Waters, that he was full of bullshit and spreading "garbage". Mikolay's testimony on this was denied to the Jury. Evidence of lack

of belief goes to the very HEART of Count II. It weighs heavily upon an issue of ULTIMATE fact in a case which the Court called "skinny". Denial to the Jury was prejudicial to the extreme. Offer of proof was made. and was not dealt with appropriately. Scotland County v Hill, 112 U.S. 183,186 (1884); Evid Rule 103.

The issue was Jensen's belief. Any declarations by Jensen to Mikolay to be introduced related to Jensen's belief. Denial of such evidence to the jury upon the pivotal matter in that Count (i.e., belief) is highly prejudicial. When proffered evidence is of substantial probative value, and won't prejudice or confuse, all doubt should be resolved in favor of admissibility. U.S. v. Kelly, 888 F.2d 732, 743 (CA 11 1989).

Out-of-court declarations are admissible to show state of mind when that is in issue. Statements may circumstantially show the declarant's belief and are not hearsay. U.S. v. Brown, 490 F.2d 758, 762-3 (DC Cir 1973).

IX. Is it a denial of Due Process to deny an Instruction containing Defendant's Theory of Defense concerning structuring rather than failure to file?

Near the end of trial the Court first announced that this was a non-filing case rather than a structuring case. It refused Jensen's requested structuring instruction as per Ratzlaf, id. This was a denial of jury trial. Sullivan v. Louisiana, 124 L.Ed.2d 182 (1993). The Circuit continued the error by treating this as a structuring matter but refusing to address the failure to have any structuring instruction.

X. The Court having entered separate judgment of forfeiture as penalty for conduct concerned in Counts I and II, and the Defendant having satisfied such penalties as ordered, is it a prohibited second punishment under Double Jeopardy to incarcerate pursuant to a second order

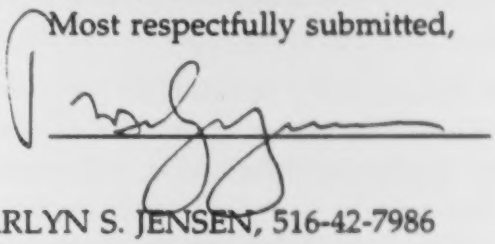
providing separate and distinct punishment for the same conduct?

The statute provides punishment of fine and incarceration. Separate trial was held by the Court concerning the alleged forfeiture of property or proceeds properly that of Thompsen. Jensen had no involvement whatsoever with any drug trafficking and there was no predicate basis for working a forfeiture against him except possibly for civil punishment. Any forfeiture should have been directed solely at Thompsen. Entry of judgment of forfeiture by the Court was punishment of Jensen. Sentence and judgment of fine and incarceration was a second punishment concerning the same facts. It violates Double Jeopardy proscriptions and is excessive punishment under the Eighth Amendment. U.S. v. Halper, 490 U.S. 435 (1989); Austin v. U.S., 113 S.Ct 2801 (1993).

CONCLUSION

WHEREFORE Petitioner prays for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit to review and reverse its affirmance.

Most respectfully submitted,



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ATTORNEY FOR PETITIONER

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-3863MNMI

United States of America,	*
	* Order Denying
Appellee,	* Petition for
	* Rehearing and
vs.	* Suggestion
	* for Rehearing
Donald Leroy Jensen,	* En Banc
	*
Appellant.	*

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

December 20, 1995

Order Entered at the Direction
of the Court:

Micheal E. Gans

Clerk, U.S. Court of Appeals,
Eighth Circuit

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 94-3863

United States of America,

Plaintiff - Appellee,

v.

Donald LeRoy Jensen,

Defendant Appellant.

* Appeal from the United States
* District Court for the
* District of Minnesota

Submitted: May 16, 1995
Filed: November 9, 1995

Before RICHARD S. ARNOLD, Chief Judge, JOHN R. GIBSON, and FAGG, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

Donald LeRoy Jensen appeals from his convictions for laundering money derived

from the illegal distribution of drugs in violation of 18 U.S.C. § 1956 (a)(1)(B)(i) (1994); laundering money represented by a law enforcement officer to be proceeds of the illegal distribution of drugs in violation of 18 U.S.C. § 1956 (a)(3)(B) and (C) (1994); and willfully failing to file a report of cash payments over $10,000 received in a trade or business as required by 26 U.S.C. § 6050I (1988)[1] in violation of 26 U.S.C. § 7203 (Supp. II 1990). He asserts twenty arguments that his convictions are unconstitutional or legally erroneous. We affirm the district court's[2] judgement.

Jensen was a co-owner and car salesman at Wells-Ford Mercury, Inc. in Wells, Minnesota. Carl Thompson, a drug dealer turned informant, testified that he approached Jensen about buying a car in 1987. Jensen told him it would be "no problem" to use cash, and Thompson bought approximately four pick-ups and four cars from Jensen from 1987 through 1992 using substantial amounts of cash. Early on, Jensen asked Thompson if he was using drug money to buy the cars and he said he was not.

Thompson testified that in September

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[1] Later amendments to this statute do not affect our analysis.

[2] The Honorable David S. Doty, United States District Court Judge for the District of Minnesota.

1992, however, he told Jensen that he had made a lot of money selling marijauna. He explained that he and a couple of friends from California were "making a large amount of money" and wanted to buy cars with cash. Thompson testified that Jensen said that as long as they were not dealing in "hard drugs like heroin or cocaine, he didn't have that big a problem with it." In October 1992, Thompson bought a 1993 Ford Explorer from Jensen for $26,790. Thompson asked Jensen how much he could pay in cash. Thompson paid for the car by financing $5,590, paying $12,200 in money orders from different banks, and paying the rest in cash.

Thompson introduced Jensen to his friends from California: Ron Scoggins, Dan Holmes and Jim Sullivan. Scoggins and Holmes traveled to Minnesota and purchased cars from Jensen using cash and cashier's checks. Holmes purchased a truck for $21,000, paying $4,000 in cashier's checks and the rest in cash. Jensen did not file a Form 8300, a Report of Cash Payments over $10,000, as required by 26 U.S.C. § 6050I.

After Thompson and his friends had bought their cars, Jensen asked Thompson if he could borrow some money. Thompson told Jensen that he could make him a loan, but it would have to be in cash. Although Thompson noted the loan in his personal calendar, Thompson and Jensen did not

record the loan or sign any documents memoralizing the existence or terms of the loan. Thompson loaned Jensen $75,000, making three cash payments to Jensen. Jensen used the money to build a home in Mankato, Minnesota. Jensen asked, and Thompson denied, that the cash was drug money.

On September 28, 1993, Thompson was arrested and he agreed to cooperate with the government. Thompson then began taping his conversations with Jensen. During those conversations, Jensen told Thompson that he hated the IRS and that the IRS was illegal. Thompson also made arrangements for an IRS agent, Billy Waters, to contact Jensen. Billy Waters used the name "Bill Fisher". Wearing a recorder, Waters negotiated the purchase of a 1993 Ford Explorer from Jensen. Waters initially told Jensen that he was a commodities broker, but later revealed that he had to go to Chicago to pick up marijauna. Waters also portrayed himself as a tax protester, telling Jensen that he did not pay taxes. In discussing how Waters would pay for the car, Jensen told Waters that if he paid more than "ten grand" in cash he had to "fill out one of those forms . . . and I don't want to do that." Jensen advised Waters how to structure the purchase with cash and money orders. Waters purchased the car for $24,950, paying $6,950 in cash, and the rest in cashier's checks

($3,000 and $9500) and money orders ($5,500).

Jensen was convicted on all counts and sentenced to forty-six months on each count, the sentences to run concurrently.[3] Jensen appeals.[4]

I.

Jensen first argues that his conviction on Count II cannot stand because 18 U.S.C. § 1956 (a)(3)(B) and (C) are unconstitutional, and that Congress has no power to enact those provisions. Jensen also argues that his conviction should be reversed for insufficient evidence and erroneous jury instructions. The basis for Count II is Water's purchase of the Ford Explorer from Jensen with money represented to be proceeds of drug trafficking.

A.

Section 1956 (a)(3) prohibits a person from conducting a financial transaction involving property represented to be the proceeds of an unlawful activity. Jensen takes issue with the

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[3] The court also ordered forfeiture of cash and imposed a $25,000 fine.

[4] Jensen also asks that we intervene in a Revenue Service audit of his 1992 and 1993 federal tax returns. The IRS audit, however, is not part of the criminal case before this court.

definition of "represented" which includes "any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section." 18 U.S.C. § 1956 (a)(3). Jensen contends that the statute requires the government to misrepresent the source of the funds, pointing out that Waters did not use drug proceeds to buy the car, but funds requisitioned from the government for the investigation. He says that because the Constitution requires the faithful execution of all laws, Congress cannot authorize an agent to violate the law, and that Agent Waters violated 18 U.S.C. § 1001 and 26 U.S.C. § 7214 by falsely representing that he was using drug money to buy the car.

The Supreme Court approved of "sting" operations similar to the one here in Jacobson v. United States, 503 U.S. 540 (1992). In that case, over a twenty-six month period, the government sent mail to the defendant offering child pornography. Id. at 542. When the defendant finally ordered the materials, he was convicted of receiving child pornography through the mails. Id. The Court reversed his conviction, reasoning that the government failed to prove that the defendant was predisposed to buy the pornography, independent of the government's extensive

efforts. Id. at 554.

The Court acknowledged, however, that the government may use undercover agents to enforce the law. Id. at 548. "It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution." Id. (quoting Sorrels v. United States, 287 U.S. 435, 441 (1932)). Thus, if the agents had simply offered the defendant the opportunity to order child pornography through the mails, the defendant could not have established entrapment. Id. at 550.

Here, Jensen did not request a jury instruction on entrapment. It is questionable whether the court could have instructed on entrapment because entrapment is an issue only if there is sufficient evidence from which a reasonable jury could find entrapment. Mathews v. United States, 485 U.S 58, 62 (1988). The elements of entrapment are the government inducement of the crime and a defendant's lack of predisposition to engage in the criminal conduct. Id. at 63. Jensen does not argue that he lacked the predisposition to violate the law. Cf. Jacobson, 503 U.S. at 548-50.

In considering the constitutionallity of Section 1956, the Fourth Circuit ruled that the mere fact that the crime can only be committed with the cooperation of a

government actor is not constitutionally damning. United States v. McLamb, 985 F.2d 1284, 1292 (4th Cir. 1993). We therefore reject Jensen's argument that 18 U.S.C. § 1956 (a)(3) is unconstitutional.

B

Along similar lines, Jensen argues that there was excessive government involvement in the undercover investigation. He contends that the government's investigation constituted outrageous conduct and that under due process he is entitled to an acquittal or a finding of entrapment as a matter of law. Again, Jensen argues that there can be no crime when the government supplies one of the necessary elements of the crime, and that Agent Waters' purchase of the car with money he falsely represented to be drug money surpassed an investigation to create a crime and evidence.[8]

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[8] Jensen cites a recent Supreme Court decision, United States v. Lopez, 115 S.Ct. 1624 (1995), as support for his argument that Congress had no power to enact Section 1956. In Lopez, the Court struck down the Gun-Free School Zones Act, making it a federal offense to possess a firearm within 1000 feet of a school, as beyond the powers of Congress, under the Commerce Clause. Id. at 1634. In enacting the money laundering statute, Congress exercised its authority not only under the Commerce Clause, but also under the authority to collect taxes, duties, imposts and excises. The reasoning of Lopez does not apply.

Although we question the wisdom of the continued investigation of Jensen for violating 18 U.S.C. § 1956 after the government already had ample evidence to support money laundering and failure to report charges, the government conduct does not amount to a due process violation. "The level of outrageousness needed to prove a due process violation is quite high, and the government's conduct must shock the conscience of the court." United States v. Pardue, 983 F.2d 843, 847 (8th Cir. (per curiam) (citation and internal quotations omitted) cert. denied, 113 S.Ct. 3043 (1993) The issue is one of law. Id.

The government's investigation of Jensen does not fall within the narrow band "of the most intolerable government conduct." Pardue, 983 F.2d at 847 (quoting United States v. Musslyn, 865 F.2d (8th Cir. 1989)) The undercover investigation is authorized by Jacobson, 503 U.S. at 548-50, as well as 18 U.S.C. § 1956 (a)(3). See also United States v. Russell, 411 U.S. 423, 436 (1973) ("there are circumstances where the use of deceit is the only practicable law enforcement technique available"); United States v. Allibhai, 939 F.2d 244, 249-49 (5th Cir. 1991) (rejecting outrageous conduct argument in connection with an undercover investigation of money-laundering scheme), cert. denied, 502 U.S. 1072 (1992). The

investigation focused on Jensen's role in laundering drug money and complying with the reporting requirements of 26 U.S.C. § 6050I. Despite Jensen's contention, the agent did not violate any law; indeed, 18 U.S.C. § 1956 (a)(3) permits the agent to tell or imply to the target that the money is drug money. See Jacobson, 503 U.S. at 549 (approving agent's offer to buy or sell drugs during investigation); Russell, 411 U.S. at 431-32 (approving agent's infiltration and participation in drug ring).

To demonstrate entrapment as a matter of law, the evidence must clearly indicate that a government agent originated the criminal design; that the agent implanted in the mind of an innocent person the disposition to commit the offense; and that the defendant then committed the crime at the urging of the government agent. United States v. Kummer, 15 F.3d 1455, 1459 (8th Cir. 1994). To rule that there is entrapment as a matter of law, we focus on the defendant's predisposition to commit the crime, not on the investigative tactics employed. Id. at 1459 n.9 (comparing defenses of entrapment and outrageous conduct). Jensen does not argue that the government agent originated the criminal design. Jensen's sales to other drug dealers and his advice to Waters on structuring his purchase undermines any argument that the agent created the

criminal design. There is no basis for finding entrapment as a matter of law. See Id. at 1459.

C.

Jensen also argues that the court erred in instructing the jury that the representation in Count II could be implied. The court instructed the jury:

> The term 'represented' does not require an explicit statement that the funds are the proceeds of illegal activity. It is sufficient that the government prove beyond a reasonable doubt that the law enforcement officer made the defendant aware of circumstances from which a reasonable person would infer that the property was drug proceeds.

At least three other circuits have ruled that a representation may be implied, and that the government agent is not required to specifically inform the defendant that the money in question is drug money. See e.g., United States v. Starke, 62 F.3d 1374, 1382 (11th Cir. 1995); United States v. Castaneda-Cantu, 20 F.3d 1325, 1331 (5th Cir. 1994) (per curiam); United States v. Kaufmann, 985 F.2d 884, 892-93 (7th Cir.) cert. denied, 113 S.Ct. 2350 (1993). The court did not

err in instructing the jury that the representation could be implied.

II.

Jensen argues that his conviction on Count I must be reversed because of insufficient evidence and erroneous jury instructions. The basis for Count I is Thompson's $75,000 loan to Jensen.

A.

Jensen contends that there was insufficient evidence that he knew he borrowed drug proceeds from Thompson, and that he intended to conceal or disuise the source of the loan.

We view the evidence in the light most favorable to the guilty verdict, giving the prosecution the benefit of all inferences reasonably drawn from the evidence. United States v. Shedlock, 62 F.3d 214, 219-20 (8th Cir. 1995). We will affirm a conviction when any rational jury "could have found the essential elements of the crime beyond a reasonable doubt." Id. (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

There is ample evidence to support the jury's verdict. Following Thompson's admission to Jensen that he had a "large return" from a marijauna smuggling deal, Jensen asked Thompson for a loan. Thompson agreed to make the loan, but told Jensen that he must make the loan in cash. Other

than Thompson's calendar, there is no record of the $75,000 loan. From this evidence, a reasonable juror could conclude that Jensen knew that the loan came from Thompson's marijauna dealings, and that the loan was designed to conceal the source of Thompson's cash. See United States v. Walcott, 61 F.3d 635, 638 (8th Cir. 1995).

B.

Jensen also argues that his conviction on Count I must be reversed because the district court erred in instructing the jury on willful blindness.[6] Jensen contends that the

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[6] The court instructed the jury:

> The element of knowledge required by Count I may be satisfied by inferences drawn from proof that a defendant delibertely closed his eyes to what would otherwise have been obvious to him. A finding beyond a reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from willful blindness to the existence of the fact.
>
> It is entirely up to you as to whether you find any deliberate closing of the eyes, and the inferences to be drawn from any such evidence. A showing of negligence or mistake is not sufficient to support a finding of willfulness or knowledge.

government cannot rely on willful blindness to prove that he knew that the loan came from drug proceeds because the government claimed he had actual knowledge that the $75,000 was drug money. He also contends willful blindness is constitutionally repugnent on several grounds, because it switches the burden of proof and requires him to prove that he is guiltless.

"A willful blindness instruction is appropriate when the defendant asserts a lack of guilty knowledge, but the evidence supports an inference of deliberate ignorance." United States v. Long, 977 F.2d 1264, 1271 (8th Cir. 1992) (citations and internal quotes omitted). "[I]n reviewing a district court's decision to give a willful blindness instruction, we must review the evidence in the light most favorable to the government." Id. (quoting United States v. Hiland, 909 F.2d 1114, 1131 (8th Cir. 1990)). Jensen claimed that he did not know Thompson was a drug dealer, and the basis for this prosecution was Jensen's objection to the IRS. Jensen relied on a lack of guilty knowledge, and we conclude the evidence was sufficient to support an inference of deliberate ignorance. Thus, the court did not err in instructing the jury on willful blindness.

III

Jensen also argues that his conviction on Count III cannot stand because 26 U.S.C. §§ 6050I and 7203 are unconstitutional, both facially and as applied. Jensen suggests that the statutes are vague and allow for selective prosecution.

We reject this argument. An ordinary person is able to understand the conduct prohibited by the statutes. Kolender v. Lawson, 461 U.S. 352, 357 (1983). The statutes require proof that the defendant knew of the reporting requirement and acted with specific intent to circumvent the requirement. 26 U.S.C. § 6050I. The statutes are not void for vagueness. See United States v. Parshall, 757 F.2d 211, 215 (8th Cir. 1985) (statute proscribing willful failure to file federal income tax returns is not unconstitutionally vague).

IV.

Finally, a dispute exists over the production of a December 21, 1993 tape made by Agent Waters.

While fitting Waters with his recording device, another agent inadvertently activated the recorder. The tape recorded about 3 1/2 hours of conversations between Waters and other agents as they drove from St. Paul to Wells. The tape ran out before Waters

completed his discussions with Jensen. Shortly after discovering that he did not tape the entire encounter with Jensen, Waters prepared a report memorializing the complete December 21 conversation with Jensen.

At trial, the government produced the cassette, as well as the transcript of the tape beginning when Waters met with Jensen. The government did not make or produce a tape covering the period when the recorder was inadvertently activated. Consulting his report, Waters testified about his discussions with Jensen after the tape ran out.

After Jensen cross-examined Waters, the government wanted to produce the complete tape. Until trial, Jensen did not know that a complete tape existed. The prosecutor stated that she would make a cassette from the tape and provide it to Jensen's counsel. Jensen alleged a violation of Federal Rule of Criminal Procedure 16 because of the government's failure to produce the complete tape. The judge stated that there was no Rule 16 violation because Jensen received what he was entitled to receive.

Despite the government's offer to produce the entire tape at trial, the government never produced the complete tape. At sentencing, Jensen renewed his motion to compel production of the

complete tape. The court ordered the government to furnish the complete tape for the court's record and for the purpose of an appeal. The government agreed to produce the complete tape but asked to "make sure there is nothing on it that we would be concerned about [unrelated] to this case." The court conditionally ordered production of the complete tape.

The government then filed a motion to redact the tape. After promising to provide the complete tape, the government learned that the complete tape contained "objectional and sensitive matters unrelated to this case." The accompanying affidavit explains that during the time the tape was inadvertently activated, the agents discussed four topics which the government sought to redact: a discussion of investigative techniques; a personal conversation of a sexual nature; a discussion of the suicides of an agent's relatives; and a discussion of other investigations. The government provided the court with an unredacted copy of the complete tape (which is actually a set of five cassette tapes).

The district court recognized that Rule 16 requires the production of all statements of the defendant as well as any information which is material to the defendant's preparation of a defense or which the government intends to use as

evidence in chief at trial. Fed. R. Crim. P. 16. The court rejected Jensen's argument that the government's failure to produce the complete tape constituted circumstantial evidence showing the conversation testified to by Agent Waters did not occur. The court found that the tape included personal information about several undercover agents as well as agency sensitive information regarding investigative techniques. The court ordered redaction of those discussions. As suggested by the government, the court ordered that a complete set of tapes be sealed and made part of the record, and that a redacted set of tapes be filed as part of the public record and served on defendant.

At oral argument Chief Judge Arnold asked the Assistant United States Attorney whether the government produced what they were ordered to produce. The attorney could not answer the question and Chief Judge Arnold asked for a letter of clarification. The Assistant United States Attorney wrote the court stating that the government filed a complete set of tapes under seal and a redacted set of tapes as part of the public record. The attorney did not state whether the government had served Jensen with the redacted set of tapes. Jensen's attorney wrote the clerk's office, stating that the government had

not served Jensen with the tapes. After the clerk of this court attempted to verify whether the government had served the redacted tapes, the Assistant United States Attorney wrote another letter conceding that although the redacted tapes have been available as part of the district court file, through inadvertance, the redacted tapes had not yet been served on Jensen. The attorney stated that the tapes were sent to Jensen's counsel on that day.

Jensen argues that the district court erred in allowing Waters to testify from the memorandum he prepared after discovering he did not record his entire conversation with Jensen. Jensen also argues that the court erred in excusing the production of the tape.

The court did not abuse its discretion in allowing Waters to testify about his unrecorded conversations with Jensen and by allowing him to consult his report. See Fed. R. Evid. 612.

It is difficult to discern whether Jensen seeks a reversal of his conviction because of a Rule 16 violation or because of a Brady violation. Insofar as Jensen argues error or abuse of discretion in the court's redaction of the tapes, we conclude that the court did not err or abuse its discretion in ordering redaction. The district court reviewed the

complete set of tapes and found it appropriate to redact those sections discussing the agent's personal conversations, conversations about investigative techniques and other unrelated investigations. Of these topics, only the discussion of investigative techniques could potentially have any bearing on Jensen's defense. We have reviewed the redacted sections of the tapes, and, like the district court, are satisfied that the redacted sections have no relevance to this case. See United States v. Manthei, 979 F.2d 124, 126-27 (8th Cir. 1992). Thus, the court did not err or abuse its discretion in ordering redaction.

Jensen's argument with respect to production of the tapes, however, is more troublesome. Despite a court order to serve Jensen with a redacted set of tapes and a request from this court seeking clarification of whether the government served Jensen with the tapes, we did not receive confirmation as to whether Jensen was ever served with the tapes until after the clerk's office contacted the Assistant United States Attorney. The government's failure to serve Jensen with the redacted tapes, despite a court order to do so, may well be the basis for sanctions. We think this issue is one best addressed first by the district court. Accordingly, we remand

the case to the district court for a determination of whether the breach of the district court's order warrants sanctions.

V.

Jensen raises a number of other arguments, including the arguments that his prosecution was based upon the exercise of his First Amendment rights, specifically his objection to the IRS, and that he was denied a public trial due to the use of jury headsets to hear tape recordings. He also complains about errors in admitting evidence and in sentencing. After carefully reviewing those arguments, we conclude that they are without merit and warrant no further discussion.

We affirm Jensen's convictions. We remand the case for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
CRIMINAL NO. 4-94-30

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	PRELIMINARY ORDER OF FORFEITURE
DONALD LEROY JENSEN, Defendant.	)	

The jury having found Defendant Donald Leroy Jensen guilty of Counts I, II, and III of the Superseding Indictment on July 11, 1994, and thereafter the Court having found by special verdict filed August 30, 1994, that certain property described in Forfeiture Counts I and II of the Superseding Indictment is subject to forfeiture pursuant to 18 U.S.C. § 982(a)(1).

IT IS HEREBY ORDERED that:

1. Defendant Donald LeRoy Jensen's right, title and interest in and to the property described as follows:

a. $24,950 in cash proceeds and

b. all that lot or parcel of land, together with it buildings, appurtenances, improvements, fixtures, attachments and easements, located at Rural Route 8, Box 34, Mankato, Minnesota, being further described as:

Extensive detailed legal description of property omitted here

is forfeited to the United States pursuant to 18 U.S.C. § 982(a)(1), effective as of the date of this Order; and

2. The Attorney General or her authorized designee may seize the foregoing property and maintain custody and control of the property pending the entry of a Final Order of Forfeiture; and

3. The United States of America shall, pursuant to 21 U.S.C. § 853(n)(1), as incorporated at 18 U.S.C. § 982(b)(1)(A), publish and give notice of this Order and its intent to dispose of the foregoing property in such manner as the Attorney General may direct; and

4. Following the Court's disposition of all petitions filed pursuant to 21 U.S.C. § 853(n)(2), or if no petitions are filed following the expiration of the period specified for the filing of such petitions, the United States of America shall have title to the foregoing property and may warrant good title to any subsequent purchaser or transferee.

LET JUDGEMENT BE ENTERED ACCORDINGLY.

Dated: 11/17/94

s/ David S. Doty

DAVID S. DOTY, Judge
United States District Court

UNITED STATES DISTRICT COURT
FOURTH DIVISION DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA, Plaintiff,

v.

Case Number CR 4-94-30

DONALD LEROY JENSEN,

Defendant.

JUDGEMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

The defendant, DONALD LEROY JENSEN, was represented by Robert Sicoli and Marlyn S. Jensen.

The defendant was found guilty on counts 1, 2, and 3 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such counts, involving the following offenses:

Title & Section	Nature of Offense	Count Number
18 USC 1956(a)(1)(B)(i)	Money Laundering	1
18 USC 1956(a)(3)(B)(C)	Money Laundering	2
26 USC 7203	Failure to File IRS Form	3

As pronounced on November 17, 1994, the defendant is sentenced as provided in pages 2 through 5 of this Judgement. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $150.00, for counts 1, 2, and 3, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgement are fully paid.

Dated: November 17, 1994 s/ David S. Doty
David S. Doty
United States
District Judge

Defendant's SSN: 471-60-8343

Defendant's Date of Birth: 04/01/48

Defendant's address: Route 8, Box 165A,
Mamkato, MN 56001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 46 months under Count 1, a concurrent sentence of 46 months under Count 2, and a concurrent sentence of 46 months under Count 3.

The Court makes the following reccommendations to the Bureau of Prisons:

That the defendant be incarcerated at the FPC Duluth, Minnesota.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons as notified by U.S. Pretrial Services.

The Court orders that defendant report for surrender after January 17, 1995.

RETURN

Marshall's Return omitted here.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

2. If this judgement imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.

3. The defendant shall not own or possess a firearm or destructive device.

4. The defendant shall provide the U.S.

Probation Office access to any requested financial information.

STANDARD CONDITIONS OF SUPERVISION

The standard conditions of supervision have been omitted here.

FINE

The defendant shall pay a fine of $25,000. The defendant is ordered to pay the costs of his supervised release. The defendant is not ordered to pay the costs of his incarceration.

The Court has determined that the defendant does not have the ability to pay interest, and it is accordingly ordered that the interest requirement is waived.

The fine shall be paid immediately and any interest owed on the fine is waived.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report except see attachment.

Guideline Range Determined by the Court:	
Total Offense Level:	23
Criminal History Category:	1
Imprisonment Range:	46 to 57 mo.
Supervised Release Range:	2 to 3 years
Fine Range:	$10,000 to $500,000
Restitution:	$ N/A

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

Attachments cited above omitted here

STATUTES IN INDICTMENT

Charged Under Count I:

18 U.S.C. § 1956 Laundering of monetary instruments

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity --

(B) knowing that the transaction is designed in whole or in part -

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than 20 years, or both.

* * *

Charged Under Count II:

18 U.S.C. § 1956 Laundering of monetary instruments

(a)(3) Whoever with the intent --

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

(C) to avoid a transaction reporting requirement under State or Federal law,

conducts or attempts to conduct a financial transaction involving property represented by a law enforcement officer to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph, the term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

* * *

Charged Under Count III:

28 U.S.C. § 6050I

Returns relating to cash received in trade or business.

(a) **Cash receipts of more than $10,000.**
Any person --
(1) who is engaged in a trade or business, and
(2) who, in the course of such trade or business, receives more than $10,000 in cash in 1 transaction (or 2 or more related transactions),

shall make the return described in subsection (b) with respect to such transaction (or related transactions) at such time as the Secretary may by regulations prescribe.

(b) **Form and manner of returns.**
A return is described in this subsection if such return --
(1) is in such form as the Secretary may prescribe,
(2) contains --
(A) the name, address, and TIN of the person from whom the cash was received,
(B) the amount of cash received,
(C) the date and nature of the transaction,
(D) such other information as the Secretary may prescribe.

(c) **Exceptions.**
(1) **Cash received by financial institutions.** Subsection (a) shall not apply to --
(A) cash received in a transaction reported under title 31, United

States Code, if the Secretary determines that reporting under this section would duplicate the reporting to the Treasury under title 31, United States Code, or

(B) cash received by any financial institution (as defined in subparagraphs (A), (B), (C), (D), (E), (F), (G), (J), (K), (R), and (S) of section 5312(a)(2) of title 31, United States Code).

(2) **Transactions occurring outside the United States.**

Except to the extent provided in the regulations prescribed by the Secretary, subsection (a) shall not apply to any transaction if the entire transaction occurs outside the United States.

(d) Cash includes foreign currency and certain monetary instruments.

For purposes of this section, the term "cash" includes --

(1) foreign currency, and

(2) to the extent provided in regulations prescribed by the Secretary, any monetary instrument (whether or not in bearer form) with a face amount of not more than $10,000.

Paragraph (2) shall not apply to any check drawn on the account of the writer in a financial institution referred to in subsection (c)(1)(B).

(e) **Statements to be furnished to persons with respect to whom information is required.**

Every person required to make a return under subsection (a) shall furnish to each person whose name is required to be set forth in such return a written statement showing --

(1) the name and address of the person required to make such return, and

(2) the aggregate amount of cash described in subsection (a) received by the person required to make such return.

The written statement required under the preceding sentence shall be furnished to the person on or before January 31 of the year following the calendar year for which the return under subsection (a) was required to be made.

(f) **Structuring transactions to evade reporting requirements prohibited.**

(1) **In general.** No person shall for the purpose of evading the return requirements of this section --

(A) cause or attempt to cause a trade or business to fail to file a return required under this section,

(B) cause or attempt to cause a trade or business to file a return required under this section that contains a material omission or misstatement of fact, or

(C) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more trades or businesses.

(2) **Penalties.** A person violating paragraph (1) of this subsection shall be subject to the same civil and criminal sanctions applicable to a person which files or fails to file or completes a false or incorrect return under this section.

28 U.S.C. § 7203

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000 ($100,000 in the case of a corporation) or imprisoned not more than one year, or both, together with the costs of prosecution. In the case of any person with respect to whom there is a failure to pay an estimated tax, this section shall not apply to such person with respect to

such failure if there is no addition to tax under Section 6654 or 6655 with respect to such failure. In the case of a willful violation of any provision of section 6050I, the first sentence of this section shall be applied by substituting "felony" for "misdemeanor" and "5 years" for "1 year".